

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

STEPHEN ELLICOTT,

Plaintiff,

v.

AMERICAN CAPITAL ENERGY, INC.,  
THOMAS HUNTON and ARTHUR  
HENNESSEY,

Defendants,

and

REDWOOD SOLAR DEVELOPMENT, LLC,

Reach and Apply Defendant.

Civil Action No. 14-CV-12152

**PLAINTIFF'S MOTION TO AMEND COMPLAINT**

Plaintiff Stephen Ellicott requests that the Court allow him to file an amended complaint in the form attached hereto at Tab 1. The Court should allow Mr. Ellicott's motion for two (2) reasons. First, Mr. Ellicott's proposed amended complaint narrows significantly Mr. Ellicott's factual allegations and bases for the relief sought. This will conserve costs and judicial resources and allow the trial in this matter to proceed more efficiently.

Second, Mr. Ellicott seeks to add Redwood Solar Development, LLC ("Redwood") as a Reach and Apply Defendant. Mr. Ellicott has filed a motion to reach and apply proceeds which are the subject of litigation between ACE and Redwood. In that case, ACE claims that Redwood owes ACE over \$12 million dollars in damages. As forth in Mr. Ellicott's attachment papers, Mr. Ellicott has more than a reasonable likelihood of success on the merits of his claims against ACE. Mr. Ellicott is entitled to secure that anticipated judgment by reach and apply injunction.

Defendants suffer no prejudice from the amendment. Additional discovery is not necessary. On the contrary, the proposed amended complaint will assist both sides to narrow the issues to be adjudicated at trial.

The civil rules require that Mr. Ellicott name Redwood as a Reach and Apply Defendant. Mr. Ellicott just recently discovered the extent to which ACE's assets are encumbered, and the number of lawsuits ACE currently finds itself embroiled in. "Rule 15(a) requires that leave to amend be given freely in the absence of any apparent or declared reason such as undue delay, bad faith or dilatory motive, or undue prejudice to the opposing party." International Environmental Management, Inc. v. Envirotron, Ltd., 724 F. Supp. 2d 230, 233 (D. Mass. 2010).

None of those circumstances exist here. The Court should allow Mr. Ellicott's motion to amend his complaint.

WHEREFORE, Plaintiff Stephen Ellicott requests that the Court allow his motion to amend his complaint in the form appended hereto at Tab 1.

December 15, 2015

Respectfully submitted,

STEPHEN ELLICOTT,

By his attorney,

/s/ Anthony L. DeProspo, Jr.  
Christopher A. Kenney (BBO# 556511)  
(cakenney@KandSlegal.com)  
Anthony L. DeProspo, Jr. (BBO# 644668)  
(aldeprospo@kandslegal.com)  
KENNEY & SAMS, P.C.  
225 Turnpike Road  
Southborough, Massachusetts 01772  
Tel.: (508) 490-8500  
Fax: (508) 490-8501

**Certification of Compliance with Local Rule 7.1(A)(2)**

I, Anthony L. DeProspero, Jr., counsel for Plaintiff, certify that on November 13, 2015 I conferred with opposing counsel in an effort to narrow or resolve the issue that is the subject of this Motion, and that opposing counsel does not assent to the relief sought in this Motion.

/s/ Anthony L. DeProspero, Jr.  
Anthony L. DeProspero, Jr.

December 15, 2015

**Certification of Compliance with Local Rule 15.1(B)**

I, Anthony L. DeProspero, Jr., counsel for Plaintiff, certify that on November 30, 2015, I caused to be served a copy of a Notice of Intent to File this motion as well as a copy of the motion on Reach and Apply Defendant Redwood Solar Development, LLC. See Tab 2, attached.

/s/ Anthony L. DeProspero, Jr.  
Anthony L. DeProspero, Jr.

December 15, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that the attached document was filed through the ECF system and was served electronically to the registered attorneys of record on December 15, 2015.

/s/ Anthony L. DeProspero, Jr.  
Anthony L. DeProspero, Jr.

# Tab 1

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

STEPHEN ELLICOTT,

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AMERICAN CAPITAL ENERGY, INC.,  
THOMAS HUNTON and ARTHUR  
HENNESSEY,

Defendants,

and

REDWOOD SOLAR DEVELOPMENT, LLC,

Reach and Apply Defendant.

Civil Action No. 14-CV-12152

**FIRST AMENDED COMPLAINT**

**Nature of the Action**

1. Plaintiff Stephen Ellicott brings this action to recover unpaid commissions he earned while employed by Defendant American Capital Energy, Inc. ("ACE"). Defendants Thomas Hunton and Arthur Hennessey serve as ACE's principals. Mr. Ellicott alleges violations of the Massachusetts Wage Act and breach of contract.

**Parties**

2. Plaintiff Stephen Ellicott is an individual residing in Barrington, Rhode Island.

3. Defendant ACE is a New Jersey corporation registered to do business in Massachusetts, with a principal place of business located in Lawrence, Massachusetts. ACE is a solar energy business.

4. Defendant Hunton is the president and a director of ACE. Upon information and belief, Hunton resides in Lyme, New Hampshire.

5. Defendant Hennessey is the treasurer and a director of ACE. Upon information and belief, Hennessey resides in Chatham, Massachusetts and owns real estate located at 41 Frost Fish Hill, Chatham, Barnstable County, Massachusetts.

6. Reach and Apply Defendant Redwood Solar Development LLC ("Redwood") is a Delaware limited liability company with a principal place of business located at 8275 S. Eastern Avenue, Suite 200-548, Las Vegas, Nevada.

**Facts**

7. Mr. Ellicott commenced working for ACE in 2007. On April 23, 2008, ACE executed an employment agreement which set forth the terms of Mr. Ellicott's compensation (the "Agreement"). A true and accurate copy of the Agreement is appended hereto at Tab A.

8. While employed with ACE, Mr. Ellicott sold eight (8) solar installations for which he has not yet been paid in full.

9. Mr. Ellicott sold solar installations to the following customers:

- (a) Heiland Electronics;
- (b) Houwelings Nurseries;
- (c) Travaille & Phippen;
- (d) The Wine Group;
- (e) UNFI, Rhode Island;
- (f) Foster Farms;
- (g) Fabricated Extrusion; and
- (h) UNFI, California

10. All conditions precedent to Mr. Ellicott being paid commissions on these projects have been satisfied.

11. ACE terminated Mr. Ellicott in 2013.

12. Pursuant to the Agreement, ACE owes Mr. Ellicott over \$1,300,000 in unpaid commissions.

13. On March 10, 2014, Mr. Ellicott filed a Non-Payment of Wages Complaint with the Office of the Massachusetts Attorney General.

14. On March 28, 2014, the Office of the Massachusetts Attorney General issued a Private Right of Action in this matter, a copy of which is appended hereto at Tab B.

**COUNT I**  
**(Violation of Massachusetts Wage Act)**

15. Mr. Ellicott repeats and incorporates herein the foregoing allegations.

16. ACE employed Mr. Ellicott between 2007 and 2013.

17. During Mr. Ellicott's employment with ACE, he earned over \$1,300,000 in sales commissions for which he has yet to be paid.

18. Mr. Ellicott's commissions have been definitely determined and have become due and payable. Defendants have not paid Mr. Ellicott commissions owed to him in violation of G.L. c. 149, § 148.

19. Defendant Hunton is liable as an employer of Mr. Ellicott pursuant to G.L. c. 149, § 148.

20. Defendant Hennessey is liable as an employer of Mr. Ellicott pursuant to G.L. c. 149, § 148.

21. Mr. Ellicott has been damaged as a direct result of Defendants' failure to pay the commissions owed to him.

22. Mr. Ellicott is entitled to treble damages, attorneys' fees, and costs pursuant to G.L. c. 149, § 150.

**COUNT II**  
**(Breach of Contract)**

23. Mr. Ellicott repeats and incorporates herein the foregoing allegations.
24. ACE executed the Agreement for valuable consideration, and the Agreement is valid and enforceable.
25. Mr. Ellicott has performed under the Agreement and is legally entitled to enforce it.
26. ACE has breached the Agreement by refusing to pay Mr. Ellicott the commissions owed to him.
27. As a result of ACE's breach of the Agreement, Mr. Ellicott has been damaged.

**COUNT III**  
**(Reach and Apply)**

28. Mr. Ellicott repeats and incorporates herein the foregoing allegations.
29. ACE has brought suit against Redwood claiming damages of over \$12 million.
30. Mr. Ellicott is entitled to reach and apply any amounts Redwood owes ACE to satisfy ACE's obligations under the Agreement.
31. Mr. Ellicott is unaware of the existence of any liability insurance to satisfy ACE's obligations under the Agreement.
32. Mr. Ellicott is also entitled to a preliminary injunction against Redwood, or any party acting on Redwood's behalf, to prevent Redwood from conveying, assigning, transferring, pledging, encumbering, mortgaging, receiving, liquidating, disposing of, or in any manner dissipating ACE's interest in amounts due from Redwood to ACE.

**Prayers for Relief**

WHEREFORE, Plaintiff Stephen Ellicott respectfully requests that the Court:

- A. Enter judgment in Mr. Ellicott's favor on Count I against all Defendants, including treble damages and attorney's fees pursuant to the Massachusetts Wage Act;



- B. Enter judgment in Mr. Ellicott's favor on Count II against Defendant American Capital Energy, Inc.;
- C. Pursuant to Count III, issue a preliminary injunction ordering that Reach and Apply Defendant Redwood Solar Development LLC, or any party acting on its behalf, be restrained and enjoined from conveying, assigning, transferring, pledging, encumbering, mortgaging, receiving, liquidating, disposing of, or in any manner dissipating ACE's interest in amounts due from Redwood to ACE.
- D. Award Mr. Ellicott interest and costs; and
- E. Grant such other relief as the Court deems appropriate.

December 15, 2015

Respectfully submitted,

STEPHEN ELLICOTT,

By his attorney,

/s/ Anthony L. DeProspo, Jr.

Christopher A. Kenney (BBO# 556511)

(cakenney@KandSlegal.com)

Anthony L. DeProspo, Jr. (BBO# 644668)

(aldeprospo@kandslegal.com)

KENNEY & SAMS, P.C.

225 Turnpike Road

Southborough, Massachusetts 01772

Tel.: (508) 490-8500

Fax: (508) 490-8501

# TAB A

## AMERICAN CAPITAL ENERGY

April 23, 2008

Comp plan confirmation for Steve Ellicott with American Capital Energy.

- 1) You will be a full-time American Capital Energy employee ✓
- 2) Sales Commission - 40% of profit margin on each sale and installation to be paid within 30 days after the client pays ACE and installation is complete. The commissions may be reasonably split with various sales support personnel by mutual agreement.
- 3) There is a draw paid monthly at the annual rate of \$120,000
- 4) 401k participation
- 5) Medical benefits through ACE:
  - a. Group policy from ACE with \$100/monthly cost to you for individual policy and \$200/month cost to you for a family policy.
- 6) Office expenses are covered including.
  - a. Communication expenses
  - b. Office Equipment or notebook needed to perform your role
  - c. Copying and consumables
- 7) Cell phone and service will be provided or reimbursed by ACE
- 8) Travel expenses relating to the role will be reimbursed
- 9) Equity stock and/or stock options in ACE will be allocated when the company begins this program

American Capital Energy

*1/16/08*  
Tom Hutton, President  
15 Tyngsboro Rd Suite 4A  
N. Chelmsford, MA 01863



# TAB B



MARTHA COAKLEY  
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE  
BOSTON, MASSACHUSETTS 02108

(617) 727-2200  
(617) 727-4765 TTY  
[www.mass.gov/ago](http://www.mass.gov/ago)

March 27, 2014

Mr. Stephen Ellicott  
37 Riverside Drive  
Barrington, RI 02806

RE: Private Right of Action - Stephen Ellicott  
Authorization for Immediate Private Suit - American Capital Energy, Inc.

Dear Mr. Ellicott:

Thank you for contacting the Office of the Attorney General's Fair Labor Division.

This letter is to inform you that we carefully reviewed the complaint and have determined that the proper resolution of this matter may be through a private suit in civil court. Accordingly, we are authorizing you to pursue this matter through a civil lawsuit immediately.

Massachusetts General Laws, chapter 149, sec. 150 and chapter 151, secs. 1B and 20 establish a private right of action for employees who believe they are victims of certain violations of the state wage laws. If you elect to sue in civil court, you may bring an action on your clients' behalf and others similarly situated, and they may obtain injunctive relief, treble damages for any loss or wages and other benefits, as well as the costs of litigation and reasonable attorneys' fees.

Without making a judgment on the merits of the complaint, this correspondence represents this office's written assent to sue and grants you the authority to pursue this matter against the employer *as well as against the president, treasurer of the corporation and any officers or agents having the management of such corporation*, immediately, as permitted by Massachusetts General Laws chapters 149 and 151. This office will not take further enforcement action at this time.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Bruce Trager".

Bruce Trager  
Assistant Attorney General  
Fair Labor Division  
(617) 727-2200 extension 2336

# Tab 2

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

STEPHEN ELLICOTT,

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THOMAS HUNTON and ARTHUR  
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Defendants,

and

REDWOOD SOLAR DEVELOPMENT, LLC,

Reach and Apply Defendant.

Civil Action No. 14-CV-12152

**PLAINTIFF'S NOTICE TO FILE MOTION TO AMEND COMPLAINT**

Plaintiff Stephen Ellicott hereby notifies Redwood Solar Development, LLC ("Redwood") of his intent to move to amend his complaint to add Redwood as a Reach and Apply Defendant. A copy of the motion to amend is accompanied herewith. Pursuant to Local Rule 15.1(B), Plaintiff intends to file the motion fourteen (14) days following service of this notice.

November 30, 2015

Respectfully submitted,  
STEPHEN ELLICOTT,

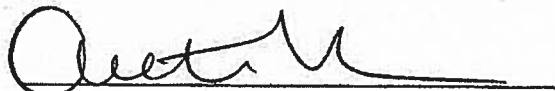
By his attorneys,

/s/ Anthony L. DeProspero, Jr.  
Christopher A. Kenney (BBO# 556511)  
(cakenney@KandSlegal.com)  
Anthony L. DeProspero, Jr. (BBO# 644668)  
(aldeprospero@kandslegal.com)  
KENNEY & SAMS, P.C.  
225 Turnpike Road  
Southborough, Massachusetts 01772  
Tel.: (508) 490-8500  
Fax: (508) 490-8501

**CERTIFICATE OF SERVICE**

I certify that I served a true copy of this document by hand (mail) facsimile upon all attorneys of record on the date specified below:

Dated: November 30, 2015

  
Anthony L. DeProspo, Jr.